

- (4) Whether an overpayment of temporary total disability compensation may be credited against an award of permanent partial disability compensation; and,
- (5) Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant poses in his Application for Review the issue of whether an Administrative Law Judge may raise and decide an issue in an award which was not raised by the parties. This issue concerns the payment of temporary total disability compensation. In his Award, the Administrative Law Judge found:

“Upon a consideration of the entire record, it is found that claimant has failed to prove by a preponderance of the evidence that the accidental injury of January 3, 1988 disabled him from performing his work as a janitor for the respondent, and therefore, the referral for vocational rehabilitation assessment and plan, as well as temporary total disability compensation during that period, should be and is hereby set aside.”

It was determined that the respondent and insurance carrier paid \$30,325.20 in temporary total disability compensation, all of which was paid pursuant to an order for vocational rehabilitation assessment and the subsequent plan. The Administrative Law Judge, in his Award, determined that vocational rehabilitation was not appropriate as the claimant was capable of returning to and performing the same work with the same employer. Claimant did in fact work for the respondent following his injury for a considerable period of time before being terminated. At the preliminary hearing, it was determined that claimant's termination was due to his physical limitations attributable to his injury and vocational rehabilitation benefits were ordered. Upon a full hearing on the claim, it was determined by the Administrative Law Judge in the Award that the earlier finding was in error and that claimant's termination was due to his poor job performance, unrelated to his physical condition. Accordingly, claimant was overpaid temporary total disability compensation in the amount of \$30,325.20 and presumably also vocational rehabilitation expenses totalling \$7,614.26. The Administrative Law Judge awarded permanent partial disability compensation totalling \$22,710.94 and offset that award against the overpayment of temporary total disability compensation. The difference was ordered refunded to the respondent and its insurance carrier by the Kansas Workers Compensation Fund. Before we can reach the issue concerning the offset of temporary total disability compensation and the other issues raised by claimant in his appeal, we must first address the issue of whether overpayment of temporary total disability compensation was an issue ripe for determination by the Administrative Law Judge.

A regular hearing was held in this case on November 29, 1993. Although there was some question as to the actual amount of temporary total disability compensation paid, and there was an issue as to average weekly wage which could result in a claim for underpayment of temporary total disability compensation made by claimant; the respondent did not allege an overpayment of temporary total disability compensation. Neither vocational rehabilitation nor the payment of temporary total disability compensation during the period of vocational rehabilitation was made an issue at the regular hearing. Claimant now contends that it was error for the Administrative Law Judge to make the payment of temporary total disability compensation an issue and decide same in his Award. Claimant alleges he was prejudiced because he was not afforded an opportunity

to present evidence specifically going to that issue. Respondent argues that the payment of temporary total disability compensation was not made voluntarily but was ordered by the Administrative Law Judge following a preliminary hearing at which time the respondent argued against the need for vocational rehabilitation. It is respondent's contention that this should have alerted the claimant to the issue and indeed preserved the issue for determination in the final award.

Director's Rule 51-3-8 provides, "Evidence shall be confined to the matters actually ascertained to be in dispute." It also states that, "All parties shall be given reasonable opportunity to be heard."

After reviewing the record, it is not clear to the Appeals Board what additional evidence the claimant may have presented on the issue of temporary total disability compensation. It is noted that claimant litigated this case from the standpoint of a work disability claim. It would seem that the evidence of restrictions and work disability would have a direct bearing on the issue of the need for the vocational rehabilitation benefits that were provided. Furthermore, it is troublesome to the Appeals Board that at oral argument on this appeal, which was held over four (4) months following the entry of the Award by the Administrative Law Judge, claimant's counsel still could not describe with any specificity what additional evidence the claimant desired to present. Nevertheless, under the circumstances we find that the claimant's request for remand in order to present evidence on the issue of temporary total disability compensation and vocational rehabilitation is warranted in order to give claimant a full and fair opportunity to address the issues presented by this claim. Respondent, while disagreeing that claimant was surprised by this issue, nevertheless agrees that a remand of this matter for additional evidence on this issue would be a preferable remedy to disallowing consideration of the issue based upon the stipulations taken at the regular hearing.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this proceeding should be, and hereby is, remanded to the Administrative Law Judge for an order granting the parties a reasonable time to present such additional evidence as may be necessary or appropriate on the sole issue of the appropriateness of vocational rehabilitation and the payment of temporary total disability compensation during vocational rehabilitation, whereupon the Administrative Law Judge shall make such additional findings and orders as he finds necessary and appropriate upon the rehearing of this claim. The Appeals Board does not retain jurisdiction over this matter and the parties must file a new Application for Review and follow the appropriate procedures, should they be aggrieved, after they receive the additional findings and award from the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Rex Henoch, Shawnee Mission, KS
James R. Ward, Administrative Law Judge
George Gomez, Director